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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	77443720
Applicant	Twin Associates, LC
Applied for Mark	EVITAMINS
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APPLICANT:	Twin Associates, LC)	EX PARTE APPEAL
)	
MARK:	EVITAMINS)	<u>BRIEF OF APPLICANT</u>
)	
SERIAL NO.:	77/443720)	
)	
FILING DATE:	April 9, 2008)	

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I. INTRODUCTION

Pursuant to a Notice of Appeal filed May 12, 2009, the Applicant has appealed the Trademark Examining Attorney's final refusal to register Applicant's mark EVITAMINS in International Class 35. The refusal to register the mark was based on the grounds that the mark is merely descriptive under Section 2(e)(1) of the Trademark Act, and generic, and thus incapable of serving as a source identifier for Applicant's services. The Examining Attorney's conclusions that the mark is merely descriptive, is generic, and has not acquired distinctiveness were incorrect. The Examiner's determination that the mark is generic is not supported by appropriate evidence.

Based on the arguments set forth below, Applicant respectfully disagrees with the Trademark Examining Attorney, and contends that the mark is not generic, has attained acquired distinctiveness through Applicant's exclusive and continuous use in interstate commerce for over 6 years, and that the Examining Attorney has failed to refute the prima facie evidence presented by Applicant. Thus, the mark is eligible for registration on the Principal Register under Section 2(f) of the Trademark Act. The Examining Attorney's determinations should be reversed and the application remanded for publication.

II. DESCRIPTION OF THE RECORD

The record consists of the application file, namely:

1. The application filed April 9, 2008 for the mark EVITAMINS for "mail order catalog services featuring vitamins and dietary supplements; on-line retail store services featuring vitamins and dietary supplements;"
2. The first Office Action dated July 22, 2008;
3. The Applicant's Response to the first Office Action dated January 19, 2009;
4. The second Office Action dated February 23, 2009;
5. The Applicant's Response to the second Office Action dated April 9, 2009;
6. The final Office Action dated April 17, 2009; and

7. The Notice of Appeal filed herein on May 12, 2009.

III. STATEMENT OF THE ISSUES

- A. Did the examining attorney err in determining that Applicant failed to provide sufficient evidence of acquired distinctiveness for the mark EVITAMINS?
- B. Did the examining attorney provide sufficient evidence in support of his finding that the mark is merely descriptive?
- C. Did the examining attorney provide sufficient evidence in support of his finding that the mark is generic?
- D. Can a trademark be determined to be generic simply because of a letter “e” prefix?

IV. RECITATION OF FACTS

Applicant applied for the mark for the mark EVITAMINS for "mail order catalog services featuring vitamins and dietary supplements; on-line retail store services featuring vitamins and dietary supplements." In the first Office Action dated July 22, 2008, the Examiner found no similar registered or pending mark which would bar registration. Nonetheless, the Examiner refused registration.

Registration was initially refused under Trademark Act Section 2(e)(1) because the Examiner stated the mark merely describes a feature and subject matter of Applicant's services. 15 U.S.C. §1052(e)(1). The Examiner also advised the Applicant that “in addition to being merely descriptive, the applied-for mark appears to be generic in connection with the identified services and, therefore, incapable of functioning as a source-identifier for applicant's services.” In response, Applicant respectfully disagreed with the Examiner’s determination, traversed the rejection, and argued, in the alternative, that the mark had acquired distinctiveness.

In a second Office Action dated February 23, 2009, registration was then refused because the Examiner stated that the applied-for mark is generic. Trademark Act Section 2(e)(1), 15 U.S.C. §1052(e)(1). The Examiner stated that Applicant’s claim of acquired distinctiveness under 15 U.S.C. §1052(f) was insufficient to overcome the refusal because no amount of purported proof that a generic

mark has acquired secondary meaning can transform it into a registrable trademark. *See In re Bongrain*, 894 F.2d 1316, 1317 n.4, 13 USPQ2d 1727, 1728 n.4 (Fed. Cir. 1990); *H. Marvin Ginn Corp. v. Int'l Ass'n of Fire Chiefs, Inc.*, 782 F.2d 987, 989, 228 USPQ 528, 530 (Fed. Cir. 1986). Applicant respectfully disagreed, traversed the rejection, and respectfully requested registration of the applied-for mark.

In the final Office Action dated April 17, 2009, the Examiner's previous refusals were maintained and made final. The Examiner also stated that the proposed mark is incapable of serving as a source-identifier for Applicant's services and that no amount of evidence of acquired distinctiveness could establish that the mark is registrable. Following the third Office Action in which the refusals to register were made final, the Applicant filed its Notice of Appeal herein on May 12, 2009.

V. ARGUMENT

A. EVITAMINS HAS ACQUIRED DISTINCTIVENESS

In the alternative, and without conceding that the proposed mark was descriptive, Applicant submitted evidence that its EVITAMINS mark has acquired distinctiveness under Trademark Act Section 2(f), 15 U.S.C. § 1052(f). To establish acquired distinctiveness under Section 2(f), an Applicant may submit a verified statement that the mark has become distinctive of the services by reason of substantially exclusive and continuous use in commerce for at least five years prior to a claim of distinctiveness, or may submit actual evidence of acquired distinctiveness. TMEP § 1212. Applicant submitted both a verified statement and actual evidence of acquired distinctiveness. As set forth in TMEP § 1212.02(c), an applicant may claim acquired distinctiveness without conceding that a mark is descriptive:

"An applicant may argue the merits of an examining attorney's refusal and, in the alternative, claim that the matter sought to be registered has acquired distinctiveness under §2(f). Unlike the situation in which an applicant initially seeks registration under §2(f) or amends its application without objection, the alternative claim does not constitute a concession that the matter sought to be registered is not inherently distinctive. *See In re E S Robbins Corp.*, 30 USPQ2d 1546 (TTAB 1992); *In re Professional Learning Centers, Inc.*, 230 USPQ 70, 71 n.2 (TTAB 1986)."

In support of its contention that the EVITAMINS mark has acquired distinctiveness, Applicant submitted the Declaration of Thomas Wick. The Declaration of Thomas Wick attested that Applicant has used the EVITAMINS mark continuously and exclusively for at least five years prior to the claim of distinctiveness, which itself is prima facie evidence of acquired distinctiveness. *See* 15 U.S.C. § 1052(f); *see also In re Owens-Corning Fiberglass Corp.*, 774 F.2d 11, 16 (Fed. Cir. 1985).

Applicant submitted evidence that is prima facie to establish that its mark has become distinctive of its business. The evidence included the Declaration of its president, Thomas Wick, who attested to first use of the mark in connection with the business since about 2003 and that EVITAMINS spends tens, and sometimes hundreds, of thousands of dollars in advertising each year (see EXHIBIT 1 in Applicant's response to the first Office Action); news stories and other studies that specifically refer to EVITAMINS as further support that the mark sought to be registered identifies and distinguishes Applicant as a **source** of goods and has acquired distinctiveness (see EXHIBITS 2-8 in Applicant's response to the first Office Action); a printout of the *Google.com* screen showing some 466,000 hits for "evitamins," virtually all of which refer to Applicant's EVITAMINS on-line retail vitamin store (see EXHIBIT 9 in Applicant's response to the first Office Action); customer satisfaction surveys from on-line sources showing that the relevant consumers understand and recognize EVITAMINS to be Applicant's on-line retail vitamin store (see EXHIBITS 10-12 in Applicant's response to the first Office Action); and a printout of the *couponcabin.com* screen showing EVITAMINS listed along with other well-known retailers such as **Macy's, Target, Kohl's, Weight Watchers, NBC, and GNC** (see EXHIBIT 13 in Applicant's response to the first Office Action), which further supports Applicant's contention that the EVITAMINS mark identifies and distinguishes Applicant as a **source** of goods and has acquired distinctiveness. Bizrate.com states on its website that over 10,000 customers have rated the EVITAMINS business since 2001 (see EXHIBIT 11 in Applicant's response to the first Office Action), providing further support that Applicant is a **source** of goods and has acquired distinctiveness for its mark.

The proliferation of health-conscious consumers that buy and consume vitamins (ie, the relevant consuming public) and businesses incorporating the term "VITAMINS" in their name, have caused the relevant public to recognize that "EVITAMINS" and numerous other well-known businesses, such as "cheapvitamins.com," "Vitamin Factory," "myvitaminbiz" "Vitamin Shoppe since 1977" and "Vitamin Depot" are capable of operating as source indicators. These other retail vitamin businesses have all received Federal registrations for the marks incorporating the term "vitamin" in their registered mark. Additionally, there is no evidence that competitors use the term "EVITAMINS" to describe their retail vitamin businesses, or on-line retail vitamin businesses in general. This fact also supports Applicant's contention that the relevant public has come to identify the mark exclusively with Applicant's business.

Based on the evidence cited above, the Applicant submitted substantial evidence sufficient to show secondary meaning pursuant to Section 2(f). The Examiner simply concluded, against the weight of this evidence and the prima facie showing made by Applicant, that the mark does not have acquired distinctiveness. The Examiner cannot rebut the presumption of acquired distinctiveness, based on Applicant's prima facie evidence, by making unsupported statements that the evidence is insufficient. The Examiner's own statements indicate that the amount and character of the evidence depends on the facts of each case. But the Examiner offers no explanation or basis as to why Applicant's evidence of acquired distinctiveness is not sufficient. The Examiner did not put forth one piece of evidence that any relevant consumer seeing the EVITAMINS mark would be likely to believe that it indicates a source in some third party other than the Applicant.

B. EVITAMINS IS NOT MERELY DESCRIPTIVE

It is respectfully suggested that the Examiner has failed to meet his burden of showing by clear evidence that Applicant's mark is primarily "merely descriptive." *In re Pennzoil Products Co.*, 20 USPQ2d 1753, 1758 (TTAB 1991). Applicant's mark is in fact not primarily merely descriptive. As stated in *In re Intelligent Medical Systems, Inc.*, 5 USPQ2d 1674, 1675 (TTAB 1987):

There is a thin line between a suggestive and a merely descriptive designation, and where reasonable men may differ, it is the Board's practice to resolve the doubt in Applicant's

favor and publish the mark for opposition.

The Examiner contends that the Applicant's mark, EVITAMINS, is descriptive of the services for "mail order catalog services featuring vitamins and dietary supplements; on-line retail store services featuring vitamins and dietary supplements." Respectfully, the mark is not merely descriptive of the services for which registration is sought; rather, EVITAMINS is suggestive of the services offered by applicant and therefore is not subject to refusal under 15 U.S.C. §1052(e)(1).

Applicant's services, in their totality, are on-line selling of vitamins, herbal products, body-building supplements, bath and beauty products, pet products, sexual aids, anxiety remedies, and weight loss products, with vitamins being just *one* of the many items offered by Applicant. What EVITAMINS suggests is not a service just for purchasing vitamins, but, rather, an on-line venue for receiving health information, links to various health sources, and purchasing many other non-vitamin products. Therefore, the mark suggests an end result of using the services and, as such, is a suggestive mark. The services do not solely feature the selling of "vitamins", but are a vast array of health-related products and resources for humans and pets. Thus, the mere combination of "E" and "VITAMINS" does not convey the exact nature of the services offered by Applicant. Referring to the Applicant's website Attachments contained in the Examiner's first Office Action, it can be seen that Applicant's business is much more than "Vitamins." The website contains links to Health Resources, Health News, and its product offerings go well beyond vitamins. There are categories for Bath and Beauty products, Body Building supplements, Herbs, Pet products, Sexual aids, Weight Loss products, and More Categories which contain subheadings for Anxiety, DeTox, and Energy, among other things.

The Examiner contends that the combination of "E" and "VITAMINS" in the mark has been used to form a word that is merely descriptive. Although the words are each commonly used in separate contexts, the combination formed by the union of these two terms renders the mark either suggestive or distinctive of the services. *In re Shutts*, 217 USPQ 363 (TTAB 1983) (SNO-RAKE) held not merely descriptive of snow removal hand tool; *In re Colonial Stores, Inc.*, 157 USPQ 382 (CCPA 1968)

(SUGAR & SPICE held not merely descriptive of bakery products) And what about the fact that the term EVITAMINS just might refer to the Vitamin E complex? The Examiner has totally disregarded that possibility in arriving at his conclusion.

When Applicant's mark EVITAMINS is viewed in its entirety, it is evident that the mark is at best suggestive of the goods (vitamins) which form the basis of Applicant's business. While Applicant's business does involve selling vitamin products, it also sells numerous other products, including herbal supplements, Bath and Beauty products, Body Building supplements, Pet products, Sexual aids, Weight Loss products, and nutraceuticals for Anxiety, DeTox, and Energy, among other things.

The case law strongly supports Applicant's position that EVITAMINS is suggestive and not merely descriptive. Suggestive marks are those that, when applied to the goods or services at issue, require imagination, thought or perception to reach a conclusion as to the nature of those goods or services. TMEP § 1209.01(a). A mark is suggestive (and not descriptive) if the mark, suggests a result of using the product or service rather than immediately informing the purchasing public of a characteristic, feature, function of the product or service. *In re The Noble Co.*, 225 USPQ 749, 750 (TTAB 1985); *In re Aid Laboratories, Inc.*, 221 USPQ 1215, 1216 (TTAB 1983); *In re Pennwalt Corp.*, 173 USPQ 317, 318 (TTAB 1972); and *In re Frank J. Curran Co.*, 189 USPQ 560, 560 (TTAB 1975). EVITAMINS suggests a result potentially achievable with Applicant's services, namely, an on-line venue to receive numerous health-related services and purchase a variety of health, body and beauty aids in the form of vitamins, supplements, nutraceuticals, and related products. Imagination, thought and perception are all required to reach a conclusion that there is any association between EVITAMINS and the services offered by Applicant under its mark.

C. EVITAMINS IS NOT A GENERIC TERM

In order to carry the "substantial" burden of proof required to show that a mark is generic, the Examining Attorney must present sufficient and clear evidence to show that the mark sought to be registered is the common descriptive name for the class of goods or services for which registration is

sought. The critical issue in genericness cases is whether members of the relevant public primarily use or understand the term sought to be registered to refer to the genus (category or class) of goods or services in question. *Ginn, supra*. The following two-part test is used in *Ginn* to determine whether a designation is generic:

- (1) What is the class or genus of goods and/or services at issue?; **and**
- (2) Does the relevant public understand the designation primarily to refer to that class or genus of goods and/or services?

The *Ginn* test is a two-part test. Failure to satisfy either part of the test must result in a finding that the applied-for mark is NOT generic. With respect to the first part of the test, the genus of goods and/or services at issue is undisputed to be the sale of vitamins and vitamin-related products.

However, with respect to the second part of the *Ginn* test, and to maintain a refusal under *Ginn*, the Examiner was required to show that the relevant public understands the mark primarily to refer to that class or genus of goods and/or services and not to the **source** of the goods and/or services. The Examiner simply has not met this burden to maintain the genericness refusal. The applied for mark is **not** identified with all such on-line retail vitamin sales services in general. The applied-for mark is only identified with the Applicant's on-line retail vitamin sales services.

To determine whether a term has become generic, it is necessary to look to whether the relevant consumers understand the word to refer **only** to a particular producer's goods, or whether the relevant consumer understands the word to refer to the goods themselves. *Park 'N Fly v. Dollar Rental Car*, 718 F.2d 327 at 330. If the relevant consumer understands the word to refer to the source of the goods, then the term is not generic. However, if the disputed term is "identified with all such goods or services, regardless of their suppliers, it is generic." *Id.* (quotation marks and citation omitted). In the case of EVITAMINS, it is clear that the relevant consumers of vitamins understand the mark, EVITAMINS, to mean the **source** of the goods (ie, vitamins and nutritional supplements), and not either the goods themselves or other on-line suppliers of vitamins and associated products.

"In determining whether a term is generic, the question is not whether it has some significance to the public as an indication of the nature or class of the article, but whether that is its principal significance." *Frito-Lay, Inc. v. Bachman Co.*, 704 F.Supp. 432 (S.D.N.Y. 1989) (citing *Stix Products, Inc. v. United Merch. & Mfr., Inc.*, 295 F.Supp. 479, 490 (S.D.N.Y. 1968) (emphasis in original)). The US Court of Appeals has addressed the standard for determining genericness in several cases. In *Surgicenters of America, Inc. v. Medical Dental Surgeries Co.*, 601 F.2d 1011 (9th Cir.1979), the Court said: "If buyers take the word to refer *only to a particular producer's goods or services*, it is not generic. But if the word is identified with **all** such goods or services, regardless of their suppliers, it is generic." Id. at 1016 [Emphasis added]. In *Anti-Monopoly, Inc. v. General Mills Fun Group*, 611 F.2d 296 (9th Cir.1979), the court stated: "[T]he [challenged] trademark is **valid only if** 'the primary significance of the term in the minds of the consuming public is not the product *but the producer*.'" Id. at 302 (quoting *Kellogg Co. v. National Biscuit Co.*, 305 U.S. 111, 118, 59 S.Ct. 109, 113, 83 L.Ed. 73 (1938)); see also *Anti-Monopoly, Inc. v. General Mills Fun Group, Inc.*, 684 F.2d 1316, 1319 (9th Cir.1982), cert. denied, --- U.S. ----, 103 S.Ct. 1234, 75 L.Ed.2d 468 (1983).

An internet search of the word "EVITAMINS" using the MSN search engine (see Exhibit 1 in Applicant's response to the second Office Action), the Yahoo search engine (see Exhibit 2 in Applicant's response to the second Office Action), and the Google search engine (see Exhibit 3 in Applicant's response to the second Office Action) show hundreds of thousands of hits showing **only** the Applicant's business as the *source of a vitamin product*, and not a generic reference to any on-line purveyor of vitamin-related products or services. Clearly, the primary significance of the term EVITAMINS in the minds of the consuming public is not the product, *but the retailer*.

The Examiner has not produced one shred of evidence that the relevant public would understand EVITAMINS to refer to any source of on-line vitamin purchases other than Applicant's on-line retail vitamin store, EVITAMINS. To the contrary, and considering all of the evidence cited by the Applicant, the primary significance to the relevant public of the word *EVITAMINS* is to Applicant's on-line retail

vitamin business and not a generic expression for all sources of on-line vitamin retailers. The Applicant has provided conclusive evidence that users and purchasers of on-line vitamin products and nutritional supplements (ie, the relevant consuming public) understand EVITAMINS to be a trademark, rather than a generic name. The appropriate "test for genericness is whether the [relevant] public perceives the term primarily as the designation of the article." *Blinded Veterans Association v. Blinded Veterans Foundation*, 872 F.2d 1035, 1041 (D.C. Cir. 1989). Clearly, the relevant public does not associate the term EVITAMINS with a (vitamin) product, but rather the *source of (vitamin) products*.

“In order to sustain a genericness refusal, there must be a "substantial showing by the Examining Attorney that the matter is in fact generic ... based on clear evidence of generic use.” *In re American Fertility Society*, 51 USPQ2d at 1836 (emphasis added), quoting *In re Merrill Lynch Pierce Fenner & Smith, Inc.*, 828 F.2d 1567, 4 USPQ2d 1141, 1143 (Fed. Cir. 1987). Moreover, any doubt whatsoever on the issue of genericness must be resolved in favor of the applicant. *In re Waverly Inc.*, 27 USPQ2d 1620, 1624 (TTAB 1993). The Examiner has failed to sustain his genericness refusal because he did not produce any evidence that illustrates the perception of the general consuming public with respect to the mark EVITAMINS or generic use of the word by competitors or other third parties. To the contrary, the relevant consuming public readily perceives and understands the word EVITAMINS to refer only to Applicant’s on-line retail store services featuring vitamins.

D. AN “e” PREFIX DOES NOT MAKE A MARK GENERIC

The Examiner contends that the "e" prefix, coupled with a generic word or term, makes the entire mark generic. The Examiner further contends that the letter “e” used as a prefix has become commonly recognized as a designation for goods and/or services that are electronic in nature or are sold or provided electronically. That statement is simply not true with regard to this case. The “E” prefix coupled with the word “Vitamins” also refers to the Vitamin E complex. With reference to Exhibit 2 in Applicant’s response to the second Office Action, it is clearly shown that “E Vitamins” may refer to that family of vitamin products containing the Vitamin E complex.

The evidence of genericness relied upon by the Examiner consists of simply the dictionary definition of the key word, *Vitamins*, making up part of the Applicant's mark. However, the Examiner made no attempt to search for a definition of the term "evitamins" with respect to a dictionary definition that would be conclusive evidence that the term EVITAMINS is generic. Applicant, however, visited The Free Dictionary online and searched for a definition of the word "evitamins." The results (see Exhibit 4 in Applicant's response to the second Office Action) show three entries: the first two being references to the Applicant's business and the third to the family of vitamin products containing the Vitamin E complex. The Examiner has not produced one piece of evidence to suggest that the public would understand EVITAMINS to refer to a class of on-line vitamin retailers. Rather, it has been shown conclusively that EVITAMINS may refer first to Applicant's on-line retail vitamin store or secondly to that family of vitamin products containing the Vitamin E complex.

As supported by the Applicant's evidence presented in this case, EVITAMINS may refer either to Applicant's on-line retail vitamin store or to that family of vitamin products containing the Vitamin E complex. But, there is absolutely no evidence that the relevant public would understand the letter E and the word VITAMINS to refer to any general source of on-line vitamin sellers or retailers. To the contrary, and considering all of the evidence previously submitted by the Applicant (which is incorporated herein by reference), the primary significance to the relevant public of the word *EVITAMINS* is to Applicant's on-line retail vitamin business and not a generic expression for all sources of on-line vitamin retailers. The documentation presented previously is conclusive evidence that users and purchasers (ie, the relevant consumers) of on-line vitamin products and nutritional supplements understand EVITAMINS to be a trademark, rather than a generic name.

Applicant respectfully directs the Board's attention to a subset of registered marks owned by third-parties that are set forth in the Registry, notwithstanding the Examiner's position that third-party registrations are not conclusive on the question of genericness. There are numerous third-party registrations of record, which issued on the Principal Register, of marks that are analogous to Applicant's

in that the marks use the composite “E_____” in various Int’l Classes, most without disclaimers. These include: **EFAUCETS, EINSURANCE, EHEALTH, EMEDICAL, ECARD, EBILLING, EPHARMACY, EHELP, ESERVICE, ETRAVEL, EPLANS, ESCIENCE, EFLORIST, ENEWS, EDENTIST, EMEDICINE**, etc.

If the Examiner’s position reflects the position and policy of the USPTO with respect to the use of the “e” prefix, then why would EFLORIST not be deemed generic with respect to any florist offering on-line floral services? Or why would EDENTIST not be deemed generic with respect to any dentist offering on-line dental-related advice or services? Or why would ETRAVEL not be deemed generic with respect to any travel agent offering on-line travel-related services?

E. APPLICANT DOES NOT USE ‘EVITAMINS’ AS A GENERIC TERM

Applicant has made consistent and proper use of EVITAMINS as a trademark and does not use it in any generic manner whatsoever. Applicant's proper use of the mark is shown on its website and in its advertising materials. This fact weighs against a finding that the mark is generic. See *Zimmerman v. Nat’l Assn. Of Realtors*, 70 USPQ 2nd 1425, 1430 (TTAB 2004) (REALTOR found not generic where owner consistently used the mark in manner consistent with its proprietary nature). The Examiner has again failed to rebut Applicant’s evidence or supply any evidence of its own to support his position.

Furthermore, the Examiner has presented no evidence to support any contention that Applicant’s competitors use the term EVITAMINS to generally describe their on-line vitamin sales and services. Applicant searched competitors’ websites, searching on the keyword ‘evitamins’, and demonstrated conclusively that they do not use or refer to their products or services generically as “evitamins”. Applicant makes specific reference to the following Exhibits that were submitted in Applicant’s response to the second Office Action (and which are incorporated by reference herein): Vitamin Shoppe (see Exhibit 5 in Applicant’s response to the second Office Action), Vitamin Café (see Exhibit 6 in Applicant’s response to the second Office Action), GNC Vitamin Store (see Exhibit 7 in Applicant’s response to the second Office Action), Vitamin Warehouse (see Exhibit 8 in Applicant’s response to the

second Office Action), Vitamin World (see Exhibit 9 in Applicant's response to the second Office Action), Nature Made (see Exhibit 10 in Applicant's response to the second Office Action), or Swanson Vitamins (see Exhibit 11 in Applicant's response to the second Office Action). These exhibits support Applicant's contention that the relevant public and Applicant's competitors have come to identify the EVITAMINS mark only with Applicant's business, and not with on-line vitamin retailers in general.

Contrary to the Examiner's position, the applied-for mark is not generic in connection with the identified services and is clearly shown to be functioning as a source-identifier for only Applicant's services.

VI. SUMMARY

Based on the arguments set forth above, it is respectfully suggested that the record established by the Examiner in this case does not sustain the high burden of proof required to show that a mark is generic. There has been no evidence presented by the Examiner to show that anyone uses the mark **EVITAMINS** to refer to anything other than Applicant's business. The Examining Attorney has not presented clear evidence that **EVITAMINS** is generic for electronic or online sales of vitamin products. The term used by Applicant for its mark is not generic, and thus registrable under Section 2(f) of the Trademark Act based upon the prima facie evidence of Applicant and the consistent and proper use of the mark by the Applicant.

It is further respectfully suggested that the record established by the Examiner in this case does not sustain the refusal to register, and that the information provided by Applicant corroborates and supports a withdrawal of the refusal to register, Applicant's mark, **EVITAMINS**, on the basis that it is merely descriptive. In the alternative, if the Board is not persuaded to overturn the Examiner's "merely descriptive" refusal for registration, then the mark should be allowed to proceed to registration on the Principal Register pursuant to Section 2(f) of the Trademark Act.

WHEREFORE, for the reasons stated above, Applicant prays that this Board reverse the refusal to register this mark, and pass the application on to publication.

Respectfully submitted,

A handwritten signature in black ink that reads "Thomas Randazzo". The signature is written in a cursive style with a long, sweeping tail on the letter 'z'.

Dated: June 30, 2009

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